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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

DENNIS ROY CHOATE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The petitioner, Dennis Roy Choate, respectfully files this Brief in reply to the Brief for the United States in

Opposition to the Petition for Writ of Certiorari and argues as follows:

ARGUMENTS

I

PETITIONER SUFFICIENTLY ASSERTED THE EXISTENCE OF INTENTIONALLY FALSE MISSTATEMENTS IN THE MAIL COVER APPLICATION

The Government, in its Brief in Opposition, at page three thereof, concedes that Petitioner's motion to suppress in the District Court averred that the facts alleged in the application for the mail cover were intentionally false. At page three of that Brief the Government further concedes that the District Court below denied the motion without an evidentiary hearing on the sole precise basis that even if Petitioner were to establish intentional misrepresentations in the mail

cover application, still suppression was inappropriate under the decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741.

In this context it thus should be noted that the Government's present argument at page six of its brief -- that Petitioner's renewed motion to suppress was inadequate because not accompanied by any new affidavits or offer of proof -- was never raised by the Government at any stage of the proceedings. At all times, rather, at each level below, all parties concerned, including the prosecution, the defense, the District Court and the Court of Appeal, considered the question to be one of law: Did Caceres preclude relief even where a mail cover was obtained by intentional misstatements. At no time prior hereto has the Government

challenged the sufficiency of the defense moving papers, rightfully assumed by all parties to be sufficient.

Moreover, and more directly to the point, the record below clearly establishes that with respect to the sufficiency of the assertion of intentional misrepresentations the defense presentation was far more than adequate. Contrary to the position advanced by the Government, the two fold answer to the Government's contention is found in the Opinion of the Court of Appeal itself in Choate II, United States v. Choate (9th Cir. 1978), 576 F.2d 165.

The Government argues at pages five through six of its brief that the Court in Choate II had considered and rejected the defense claims that the mail cover application contained intentional false

misstatements. Based on this premise the Government argues that the defense was required to submit new affidavits or offers of proof. The failure of this argument, however, is that the Government's primary premise is erroenous.

The Opinion of the Court in Choate II, at page 173, rather makes it clear that the issue of the veracity of the application had not been litigated in that proceeding, and thus the Court decision would not pass on that matter in the appeal. The exact language of the Court, at page 173, was as follows:

> "Although the requesting letter was apparently prepared by Agent Williams (422 F.Supp. at 254), defendant on appeal and the district judge did not question Williams' veracity, and it is inappropriate for us as reviewing judges to impugn his truthfulness on the basis of a cold record that can be read consistently with the contents of the letter."

As is clear from the passage above, Choate II did not touch on the question of the sufficiency of the offer of proof of intentional false statements, and thus, contrary to the Government's contention, could not have ruled that the defense proffer was insufficient. The Government here simply misreads Choate II.

While the majority opinion in Choate II thus did not touch upon the question of intentional misrepresentations, the record below was sufficient to establish, as the dissent in Choate II had expressly noted at page 193 and footnote 31, that all of the material representations in the mail cover application were intentionally falsified. The areas of falsification, as contained in the record, were summarized by Judge Hufstedler in her dissent in Choate II at pages 193-195, in part, as follows:

"The mail cover request contained three material representations: (1) that the requesting authority had reason to believe Choate was "currently" organizing a narcotics smuggling ring with a South American source, (2) that it further believed that the source and Choate corresponded by mail, and thus (3) that a mail cover would aid in identifying the source,

"Williams had no "current" information on which he could assert that Choate was organizing a narcotics smuggling ring when he requested the mail cover on July 19, 1972. The only information to that effect was contained in Thompson's April, 1971, reports to the BNE which has been passed along to Customs. All efforts by Williams to obtain current information that would connect Choate with cocaine trafficking had failed (see notes and test at nn. 4-7, supra), and Thompson had informed Williams that he possessed no more recent information than that in the 1971 report. Most significant is the fact that Williams felt he could not "make a substantive case" against Choate for drug dealing, and this actually caused him to take the step of going to Sherrard of the IRS before instituting the mail cover and suggesting a tax investigation. Williams, in fact, testified that his reason for

instituting the mail cover was to look for more assets; he said nothing about a purported South American connection. Williams' testimony thus clearly revealed that he was fully aware at the time he made the mail cover request that he had no current information which indicated that Choate was organizing a smuggling ring.

"There was no indication in any of the information in Williams' possession that Choate had ever corresponded by mail with a South American contact. The averment to this effect was pure speculation based upon the initial misstatement of fact. Thompson's report indicated only that Choate had traveled to South America.

"Finally, the essential predicate for the mail cover was the statement that it was expected that it would aid in identifying the South American source. Williams' own testimony revealed, however, that prior to instituting the mail cover he had turned his attention fully to "asset tracing" and had given up any attempt to make a substantive case against Choate. (See nn. 31 & 38, supra.) This was the purpose of the mail cover -- not finding a South American address. Thus, each material representation in the request was false and known to be false by

> Williams at the time it was made. It was a bare-faced abuse of the mail cover procedure to obtain information and pursue an investigation apparently outside his jurisdiction -- asset tracing to establish a basis for an IRS prosecution -- by reciting false material facts which , if true, would logically have justified the surveillance. (See 422 F. Supp. at 271.)"

In the proceedings here below in the District Court, in Choate III so to speak, petitioner did challenge the veracity of the mail cover application and did specifically assert and offer to prove those matters described in detail in Judge Hufstedler's dissent. The Memorandum of Points and Authorities filed below quoted prior testimony to this exact effect in detail. The full offer is summarized at pages four through ten of the Appellant's Opening Brief below in the District Court, all to the same effect as Judge

Hufstedler's characterization. This offer of proof was clearly sufficient. The contentions of the Government to the contrary, made for the first time anywhere in this case at this level, and without support in the record, should be rejected.

II

THE INTENTIONALLY FALSE STATEMENTS AT ISSUE VIOLATED A FEDERAL STATUTE UNDER CIRCUMSTANCES FAR MORE SEVERE THAN IN UNITED STATES V. CACERES (1979), 440 U.S. 741 SO AS TO WARRANT RELIEF. (SEE UNITED STATES v. SOTO-SOTO (9th Cir. 1979), 598 F.2d 545).

The Government argues that intentional misrepresentations under oath in a non-Fourth Amendment area give no cause for suppression of evidence obtained by said false oaths. The Government thus urges that the federal perjury statute (18 U.S.C. § 1001) and this Court's decision

in Miller v. United States (1958), 357 U.S. 301, are to be severely limited in impact.

A recent Ninth Circuit decision, United States v. Soto-Soto (9th Cir. 1979), 598 F.2d 545, makes clear the illogic of the Government's position. It is sufficient here to quote from Soto-Soto, at page 550, in part:

> "The Court, however, specifically distinguished the Caceres situation from one where there has been a violation of a federal ___U.S. at ___, 99 S.Ct. at 1465. In footnote 21, ___U.S. at ___, 99 S.Ct. at 1473, the Court noted that "[s]ince no statute was violated by the recording of respondent's conversations, this Court's decision in Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 1332, is likewise inapplicable." In Miller, the Court excluded evidence obtained in violation of District of Columbia law and the substantially identical requirements of a federal statute.
>
> "Here, the FBI agent's action violated federal statutes. He

> ignored the divisions of authority which Congress carefully legislated. As in Miller, supra, the exclusionary rule is applicable."

Soto-Soto is equally applicable to the case at bench.

CONCLUSION

For all of the reasons set forth above it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner